Sprout v. South Bend, 277 U. S. 163, 170-171 [48 S. Ct. 502, 72 L. Ed. 833, 837, 62 A. L. R. 45]: "A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. . . . But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

The necessity of apportionment of the business for local taxing purposes, where it lends itself to that process, has been reiterated and made the basis of ruling by the United States Supreme Court many times. See Central Greyhound Lines v. Mealey, 334 U. S. 653, 663 [68 S. Ct. 1260, 92 L. Ed. 1633, 1641]; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 314 [58 S. Ct. 913, 82 L. Ed. 1365, 1371, 117 A. L. R. 429]; Joseph v. Carter & Weekes S. Co., 330 U. S. 422, 427 [67 S. Ct. 815, 91 L. Ed. 993, 1000]; Norton Co. v. Department of Rev., 340 U. S. 534, 539 [71 S. Ct. 377, 95 L. Ed. 517, 521]; East Ohio Gas Co. v. Tax Com., 283 U. S. 465, 470 [51 S. Ct. 499, 75 L. Ed. 1171, 1174]; McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 46 [60 S. Ct. 388, 84 L. Ed. 565, 570, 128 A. L. R. 876], footnote 2; Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384, 393-394 [55 S. Ct. 477, 79 L. Ed. 934, 942]; International Harvester Co. v. Evatt, 329 U. S. 416, 422 [67 S. Ct. 444, 91 L. Ed. 390, 395]; Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 609-610 [71 S. Ct. 508, 95 L. Ed. 573, 579]. "By its very nature an unapportioned gross receipts tax makes inter-

state transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" (Central Greyhound Lines v. Mealey, *supra,* 334 U. S. 653, 663 [68 S. Ct. 1260, 92 L. Ed. 1633, 1641].)

Although the opinion in City of Los Angeles v. Belridge Oil Co., 42 Cal. 2d 823 [271 P. 2d 5], does not discuss the immediate problem posed by the instant case, its reasoning makes it clear that the city's license tax cannot extend to severable interstate activities such as those at bar. Section 21.166 of the Los Angeles Tax Ordinance was there considered. It imposed a tax upon every person "manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares or merchandise at wholesale." The defendant was engaged in such business in the city, sale of crude oil and gas, but the production was in Kern County and the products were delivered in the field and never entered the territorial limits of Los Angeles. The negotiations, contracts, billing, collections, etc., occurred in the city. The company contended *inter alia* that the city could not constitutionally tax its total gross receipts as that would be an attempt to impose a tax on business carried on outside the city. The court ruled: "In the instant case we can find no objection, constitutional or otherwise, to the imposition of a business license tax on the privilege of engaging in selling activities within the city. Likewise there is no objection to basing the rate of such tax on the gross receipts attributable to such selling activities, even though various extraterritorial events contribute to such gross receipts. There is, however, one important limitation which should be pointed out and that is this: even though the city can tax the activity of selling it can only base the tax on such selling activities as are carried out within

its territorial limits. For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city should not be included. Such a construction necessarily follows from the fact that the business license tax is on the privilege of engaging in selling activities in the city of Los Angeles and as such should only be based upon such activities. . . . In the instant case a just and reasonable construction requires that the measure of the tax be limited to those gross receipts attributable to selling activities within the city of Los Angeles." (Pp. 831-832-833.) This language finds a counterpart in McLeod v. J. E. Dilworth Co., 322 U. S. 327, 330, 349 [64 S. Ct. 1023, 1030, 88 L. Ed. 1304, 1306, 1319], wherein the court held invalid a sales tax upon a transaction completed in another state, and said: "For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." The court in the Belridge case had previously quoted Martin Ship Service Co. v. City of Los Angeles, 34 Cal. 2d 793, 796 [215 P. 2d 24], as follows: " 'In view of the recent decisions of the United States Supreme Court in Memphis Natural Gas Co. v. Stone, 335 U. S. 80 [68 S. Ct. 1475, 92 L. Ed. 1832], and Central Greyhound Lines, Inc. v. Mealey, 334 U. S. 653 [68 S. Ct. 1260, 92 L. Ed. 1633], the city may clearly tax plaintiffs' local activities and the gross receipts therefrom.' " The reference to the Central Greyhound case is significant for the gross receipts tax was there sustainable only through apportionment of interstate and internal commerce, and the cause was remanded to the state court for such purpose. (334 U. S. at 663-664, 92 L. Ed. at 1642.) In the cases now on appeal

an apportionment has been made by the stipulation of facts.

Barker Bros., Inc. v. Los Angeles, 10 Cal. 2d 603, 609-610 [76 P. 2d 97], is not opposed to the foregoing views. It says at page 609: "But in any computation of the amount of its gross sales the appellant may not make any deduction for goods shipped out of the state of California. The ordinance lays a tax upon the occupation or business, not upon particular sales. The volume of gross business fixes the amount of tax to be paid. Such a tax places no direct burden on commerce in the goods sold. All taxation has some incidental and indirect effect upon interstate commerce, but an excise tax which has only such remote effect is valid." And the court explains the ruling by quoting Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 295 [42 S. Ct. 305, 66 L. Ed. 622], as follows: "'The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.'"

In view of the clear line of demarcation prescribed by the foregoing authorities, it is unnecessary to undertake a review or reconcilement of the numerous cases dealing with the validity of a local tax assessed against some local incident of interstate commerce deemed to be severable and to have detached relevance for purposes of taxation. In this category fall the cited cases of Martin Ship Service Co. v. City of Los Angeles, 34 Cal. 2d 793 [215 P. 2d 24]; Michigan-Wisconsin P. L. Co. v. Calvert, 347 U. S. 157 [74 S. Ct. 396, 98 L. Ed. 583]; Fisher's Blend

Station v. State Tax Com., 297 U. S. 650 [56 S. Ct. 608, 80 L. Ed. 956]; Utah Power & Light Co. v. Pfost, 286 U. S. 165 [52 S. Ct. 548, 76 L. Ed. 1038]; Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662 [69 S. Ct. 1264, 93 L. Ed. 1613]; Nippert v. Richmond, 327 U. S. 416 [66 S. Ct. 586, 90 L. Ed. 760, 162 A. L. R. 844]; Puget Sound Stevedoring Co. v. Tax Com., 302 U. S. 90 [58 S. Ct. 72, 82 L. Ed. 68]; Western Live Stock v. Bureau of Revenue, 303 U. S. 250 [58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944]; Memphis Natural Gas Co. v. Stone, 335 U. S. 80 [68 S. Ct. 1475, 92 L. Ed. 1832]; Cloverdale v. Arkansas-Louisiana P. L. Co., 303 U. S. 604 [58 S. Ct. 736, 82 L. Ed. 1043]; Chicago v. Willett Co., 344 U. S. 574 [73 S. Ct. 460, 97 L. Ed. 559]; McGoldrick v. Berwind-White Coal Min. Co., *supra,* 309 U. S. 33 [60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876].

Throughout the cases dealing with local taxation of a severable incident of interstate commerce runs a discussion of whether the tax is of such a nature that it may be repeated in other jurisdictions, thus threatening multiple burdens upon that commerce and its complete extinction if carried to the theoretical extreme. The effect of those cases is thus summarized by Mr. Justice Traynor, "When there is no danger that several states will impose cumulative tax burdens on the same subject, a tax upon an activity that is a *local incident* of interstate commerce may be measured by gross receipts from *that activity.*" (Emphasis added; Martin Ship Service Co. v. City of Los Angeles, 34 Cal. 2d 793 at 800 [215 P. 2d 24].) And we apprehend that the multiple burden problem is confined to the "local incidents" cases. This appears from the above quotation from Gwin, White &

Prince v. Henneford, *supra,* 305 U. S. 434, 439 [59 S. Ct. 325, 83 L. Ed. 272, 276]. Immediately following that language is this: "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. . . . Such a multiplication of state taxes, each measured by the volume of the commerce, would re-establish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." See also McGoldrick v. Berwind-White Coal Min. Co., *supra,* 309 U. S. at 57, 84 L. Ed. at 577. A tax laid upon a severable portion of an interstate business without any apportionment is a direct and unlawful burden upon interstate commerce. If the ordinance required this it would be void, at least *pro tanto.* But the record shows appellants' real complaint to be the manner in which the city officials intend to apply it to their businesses.

The description of the taxpayer in the ordinance is "every person conducting a trade school . . . where

instruction is given in any trade or occupation." It must be construed to square with the commerce clause of the Federal Constitution (art. I, §8) if that can be done reasonably. "As stated in Franklin v. Peterson, 87 Cal. App. 2d 727, 730 [197 P. 2d 788], 'It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the Constitution, but to make a valid statute or ordinance within the scope of its constitutional powers.'" (City of Los Angeles v. Belridge Oil Co., *supra,* 42 Cal. 2d 823 at 832.)

Volume 33, American Jurisprudence, page 351, section 29: ". . . a state statute imposing a general tax on certain kinds of businesses or occupations, and requiring a license to be taken out before such business or occupation shall be engaged in, must be construed as not applying to such business as may constitute interstate or foreign commerce, but only to such business of the kinds specified as constitutes local or state commerce, and to persons engaged or intending to engage therein." The proper construction of section 21.149 is that it applies to appellants' intrastate correspondence school activities (10 per cent and 18 per cent of the respective businesses) but not to the interstate activities. That it is appropriate to thus confine the general language of the ordinance also appears from certain decisions of the United States Supreme Court in which it has held the tax void as to inter-

state activities but valid as to intrastate and has remanded the cause to the state court for the purpose of appropriate allocation. We refer to Central Greyhound Lines v. Mealey, *supra,* 334 U. S. at 663-664, 92 L. Ed. at 1642; Puget Sound Stevedoring Co. v. Tax Com., *supra,* 302 U. S. at 95, 82 L. Ed. at 72; Norton Co. v. Department of Rev., *supra,* 340 U. S. at 539, 95 L. Ed. at 521.

Appellants argue, however, that the ordinance does not apply to them because the phrase, "trade school, trade college, business school, business college, beauty school, beauty college, where instruction is given in any trade or occupation," contemplates resident instruction. The argument hinges upon the use of the word "where" and counsel seem to assume that it implies only place. This is not true generally. Webster's New International Dictionary gives this definition, among others, "In the or a case or situation in which; in circumstances in which; in the contingency that. . . ." Volume 68, Corpus Juris, page 252, section 2: "As an adverb of time, 'where' has been defined as meaning when; or when in any such case. . . ." The full phrase of the section is "where instruction is given in any trade or occupation and a fee is charged for such instruction or compensation is received by such school or college by the sale of any goods, wares, merchandise or services. . . ." It seems plain that the word "where" implies contingency and not mere place and that the contingency is instruction for compensation. We find no merit in this contention of appellants.

Their second major point is that the ordinance, as applied to the period prior to its amendment (effective January 1, 1952), discriminates against trade schools in violation of the equal protection guaranteed by the Fourteenth

Amendment of the federal Constitution and article I, sections 11 and 21[2] of the Constitution of California; also section 3 of article I of the Los Angeles City Charter.[3] This, because the 4/10 of 1 per cent rate is applied to trade schools, under section 21.149, and a 1/10 of 1 per cent rate under section 21.190 to schools and colleges other than trade schools, trade colleges, business schools, business colleges, beauty schools or beauty colleges, educational institutions of collegiate grade not conducted for profit, schools operated as a function of religious or charitable institutions, and those schools licensed under sections 21.82 and 21.191 of said Los Angeles License Ordinance, also to examination coaching schools and language schools. Counsel argue that this is a revenue measure and is valid only if the classification is reasonable with respect to the purpose of the statute. Both sides agree that it is incumbent upon appellant to affirmatively establish that the challenged classification is arbitrary. And the guiding principles are laid down in Fox etc. Corp. v. City of Bakersfield, 36 Cal. 2d 136 [222 P. 2d 879], in which the city's license tax on places of amusement was under fire. At page 139 the court said: "Plainly there is discrimination in the taxes imposed by ordinance No. 754 for it does not apply to all business operated in the city. That premise also embraces the fact that plaintiffs bear

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[2]"Sec. 11. All laws of a general nature shall have a uniform operation."

"Sec. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

[3]"No discrimination in the amount of license tax shall be made between persons engaged in the same business other than by proportioning the tax to the amount of business done."

a greater burden of the taxes than other businesses." At page 141: "Plaintiffs assert that the classification is improper because it does not include all amusement businesses in the city and that they bear a major share of the taxes assessed against amusements. It will be remembered that exemptions are made of pool halls and arcades where admissions are not charged, certain religious, charitable and educational affairs, where music alone is furnished without admission charge." And at page 142: "'If a classification of persons or occupations made for the purpose of imposing taxes is founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation and otherwise, they will be deemed to be valid and binding. (5 Cal. Jur., p. 824, §188) . . . While the classification should be reasonable natural and just, in the absence of a showing to the contrary, it will be assumed there are good grounds for the classification, and the act will be upheld. (6 R. C. L., p. 378, §§369-376.) In the case of People v. Monterey Fish Products Co., 195 Cal. 548, 556 [234 P. 398, 401, 38 A. L. R. 1186], it is said in that regard: "When a legislative enactment is attacked upon this ground—of an unauthorized classification—all presumptions and intendments are in favor of the reasonable and fairness of the legislative action (5 Cal. Jur., §628 *et seq.*, and cases cited), and the decision to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary.'"

"It is well settled that occupations and businesses may be classified and subdivided for purposes of taxation, and it is within the discretion of the Legislature to exact different license taxes from different classes or subclasses of businesses, subject only to the limitations of the state

and federal Constitutions in regard to equal protection of the laws. No constitutional rights are violated if the burden of the license tax falls equally upon all members of a class, though other classes have lighter burdens or are wholly exempt, provided that the classification is reasonable, based on substantial differences between the pursuits separately grouped, and is not arbitrary." It is said in City of San Mateo v. Mullin, 59 Cal. App. 2d 652, 655 [139 P. 2d 351]: "A difference in the method of conducting a business is generally a sound basis for classification, particularly if it appears that the tax was fixed in proportion to the amount of business, which may be determined by different but reasonable methods." Moreover, "When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." People v. Western Fruit Growers, 22 Cal. 2d 494, 507 [140 P. 2d 13].) This the appellants have failed to do with respect to the classification under discussion. That the mere difference in rates charged different classes of schools does not constitute undue discrimination is conclusively settled by Fox etc. Corp. v. City of Bakersfield, *supra,* 36 Cal. 2d 136.

Lastly it is argued on behalf of National that section 21.149 is not applicable to gross receipts from its students' store. The argument is that other retail stores are charged less, under section 21.167; that prior to the 1952 amendment the tax on trade schools was eight times that exacted from retail stores, and since that amendment twice as much. It appears, however, that this students' store is but a department of National's correspond-

ence school business. It is located on the second floor of plaintiff's principal place of business, and, while open to the public, "no advertisement of its existence is present to apprise persons unfamiliar with the plaintiff's facilities of the existence of the store." The opening brief supplies the information that "it sells school supplies needed by its resident students" and "is patronized principally by students of National Schools." It is an integral part of the intrastate school which has been held subject to the tax of section 21.149 and no good reason appears for segregating it to tax it at a lesser rate. The situation is not comparable to that presented by Barker Bros., Inc. v. Los Angeles, *supra,* 10 Cal. 2d 603, and is ruled by City of Los Angeles v. Belridge Oil Co., *supra,* 42 Cal. 2d 823 and City of San Mateo v. Mullin, *supra,* 59 Cal. App. 2d 652, 658-659. The point is without merit.

The judgment in each case is reversed with instructions to make and enter judgment not inconsistent with the views hereinbefore expressed.

Wood (Parker), Acting *P. J.*, and Vallée, *J.* concurred.

Exhibit B.

Radio-Television Training School Inc.

FIELD REPRESENTATIVE'S CONTRACT

Mr. .....

Address .....

City .....

Article I

This Contract, when signed by you and signed and approved by an officer of the Radio-Television Training School, Inc., duly incorporated and existing under and by the virtue of the laws of the State of California, with its sole office and place of business in the city of Los Angeles, California, will constitute a contract between you and the Corporation, authorizing you to act as its Field Representative in the following described territory:

Article II

The compensation and the manner of same shall be in accordance with the rules and regulations governing Field Representatives as hereinafter set forth.

Article III

The term of this agreement is for a period of one year from the date of execution and shall be automatically renewed for an additional year without notice unless notice to the contrary has been given to either the School or the Field Representative in writing by registered mail within a period of at least fifteen (15) days prior to the date of renewal. Notwithstanding the foregoing, this Contract may be terminated by either party upon the

serving of notice in writing to the other at least fifteen (15) days before the effective date of termination.

Article IV

The detailed provisions of this Contract are set out on the following pages under the caption "Detailed Provisions of Contract with Field Representative" and are specifically agreed to by both parties hereto.

This Contract supersedes all previous contracts between the parties. It is specifically agreed that there are no verbal understandings contrary or additional to this written agreement.

It is further agreed that this Contract is not binding unless accepted in writing by an officer of the School in Los Angeles, California and is governed by California law, enforceable only in the State of California.

Detailed Provisions
of
Contract With Field Representative

(For convenience, Radio-Television Training School, Inc. is hereinafter designated and called "School")

Section I
"General Rules and Restrictions"

(A) Field Representative agrees to pay and discharge at his own cost and expense any and all expenses, charges, fees, taxes and obligations of any nature that may be levied or imposed by reason of activities connected with the solicitation of enrollments by him. It is expressly understood that the School shall be held free from any liability or expense which the Field Representative incurs in his own name and under no circumstance is the Field Representative authorized to represent, either impliedly

or by fact, that the School is responsible for same. The Field Representative is restricted from endorsing the name of the School to any check, post office money order, express money order, promissory note, contract agreement or any other obligation.

(B) The Field Representative agrees not to place advertising of any nature in any publication, newspaper, magazine, program, or other periodical or to broadcast on any radio or television station or to have circulars and advertising material distributed unless the advertising matter and plan of advertising has first been approved by an officer of the School.

(C) It is understood that the Field Representative will refrain from signing the School name to any commercial paper, contract or other instrument and will refrain from contracting any debt or agreement express or implied, binding the School to payment of money or otherwise.

(D) Field Representative agrees to save harmless the School from any and all fees and costs (including counsel fees) that the School may sustain or become liable for by reason of claims against it resulting from the unauthorized acts of such Field Representative.

(E) The School may at its own expense, insure the Field Representative for the benefit of the School in the form of a fidelity Bond, or any other type of insurance the School deems necessary for its own protection. The Field Representative agrees to cooperate fully in furnishing any information necessary to obtain said insurance.

(F) The Field Representative shall not either before or after the termination of this agreement disclose to any person whatsoever any information or trade secrets relating to the School or to students, or the names of pros-

pective students furnished to him by the School or acquired by him, or any information of which the Field Representative shall become possessed while acting as such. It is agreed that all records, papers, leads, names of prospective students kept or acquired by the Field Representative while acting hereunder and any and all material furnished by the School to the Field Representative shall be the exclusive property of the School open to inspection by its representatives at any time and to be surrendered to the School upon demand.

(G) The Field Representative is restricted from offering any assistance to any student at any time for the purpose of helping him with the instruction or assisting him in the study of the course of training. The Field Representative's responsibilities are limited to the duty of exclusively aiding the School in the selection of properly qualified students.

(H) The Field Representative agrees to protect the interest of the School at all times to the best of his ability, and to comply with all laws and ordinances of proper public authorities.

Section II

"Rules Regulating Enrollment Procedure"

(A) The Field Representative is to furnish to the School, the complete information required to be filled in on the enrollment contract forms, and in such cases where a Field Representative enrolls a minor, he must submit to the School the signature, on the standard form of minor guarantee, of a responsible adult, guaranteeing the specific performance of the enrollment contract on the part of the minor.

(B) The Field Representative is to contact only prospects within his designated territory and recommend those prospects, whom in his judgment, he considers to be logical candidates for training in the courses offered by the School.

(C) Upon the completion of an interview with a prospect, the Field Representative is to return to his District Representative or to the Office of the School the prospect's original letter or inquiry, or lead slip, together with a detailed report in accordance with the lead report form furnished by the School.

(D) Once a prospect has properly signed the enrollment agreement form, the original and duplicate copy of said form accompanied by the sales report form furnished by the School and the appropriate amount of money as will be hereinafter designated, must be sent immediately to the School for acceptance.

(E) The School is engaged in interstate commerce. Field Representative agrees that he will not at any time, in order to induce an enrollment, pay or grant or agree to pay or grant any part of his commission or compensation or anything of value to the prospective student or to any agent or representative of the same.

(F) Field Representative agrees to adhere strictly to selling prices and all terms and conditions that may be fixed by the School from time to time. In the event of a change in such terms and conditions the School agrees to give the Field Representative ten (10) days notice of such change.

(G) The Field Representative agrees to accept enrollments only on application contract forms as supplied to him by the School from time to time, and at the price as contained in such forms. The Field Representative is

authorized to fix the terms of payment of each enrollment procured by him to the best interest of the School and to insert the terms of payment agreed upon by the Field Representative and the student from whom the enrollment is procured in the space or spaces allotted for terms of payment. In no case, however, shall the installments, including the initial payment, be less than Five Dollars ($5.00) each, nor payable at intervals of more than one month apart.

(H) The School is not liable for commissions or damages resulting from failure to accept any enrollment when caused by:

1. Any law or order of public authority.
2. Scarcity of labor or materials.
3. Fires, strikes, lockouts or judgments.
4. Other causes beyond its control.

(I) The Field Representative understands that high-pressure selling, misleading statements, or misrepresentation, as an inducement for securing enrollments for its course of training, or otherwise, will be cause for cancellation of this sales contract without notice. In the event of such cancellation, the School reserves the right to cancel any and all commissions that have accrued or will accrue in the future or that would, otherwise, be due and payable to the Field Representative under the terms of this contract.

Section III

"Charge Backs and Penalties"

(A) In the event a student defaults in his contract within a period of thirty (30) days from the date of the receipt of the enrollment at Los Angeles and definitely refuses to make further payments, or accept any of the

mail directed to the student by the School, or take training in accord with the contract terms, it is understood that the School then and there shall have the right to enter a charge on their books against the accrual or commission account of the Field Representative, in a sum equal to 50% of the front money, as hereinafter described, retained by the representative as the deposit or initial payment.

(B) In the event that a student does not within a period of ninety (90) days from the date of the enrollment, make at least one monthly installment payment, it is understood that the School then and there shall have the right to enter a charge on their books against the accrual or commission account of the Field Representative, in a sum equal to 50% of the front money retained by the representative from the deposit or initial payment, and to cancel any or all commissions that may accrue on the enrollment.

(For example: If a Sales Representative secured an enrollment with an initial payment of Ten Dollars ($10.00), and the enrollee defaults within a period of ninety (90) days from the date the enrollment was received at the School, the School reserves the right to charge the Sales Representative's account in the sum of Three Dollars and Seventy-five Cents ($3.75) which represents fifty percent (50%) of the Seven Dollars and Fifty Cents ($7.50) front money the Field Representative retained. This charge is made to help defray the cost of expenses incurred by the School in servicing an enrollment that was not properly sold.)

(C) It is to be understood that if any student should cancel his enrollment at any time subsequent to the securing of the enrollment for alleged misrepresentation or

fraud on the part of the Field Representative, and only after said Field Representative has had an opportunity to disprove such alleged misrepresentation, then and there the School reserves the right to charge the Field Representative's accrual or commission account in a sum equal to the amount refunded to the student, inasmuch as it is the policy of the School to promptly refund the full amount of payments received to any and all students whose enrollments have been secured through misrepresentation.

(D) It is understood that the Field Representative is not to receive accrued commissions on any student account that is collected by a collection agency, attorney, or as a result of a compromise entered into between the student and the School, which the School may be forced to accept after all possible collection efforts have been made.

(E) The Field Representative agrees during the period of this Contract not to engage in any competing business nor shall he or any member of his family have any financial interest in any other school either directly or indirectly. In the event the Sales Representative violates this provision, the School may terminate this agreement and may retain as liquidated damages for the loss of business sustained by the failure of the Field Representative to comply with this provision, all commissions and accruals then due or thereafter to become due from the School on account of enrollments theretofore obtained by the Field Representative (it being agreed that the actual amount of damages is unascertainable) and the sum so retained shall be in full satisfaction and settlement thereof.

(F) If the Field Representative shall be adjudicated a bankrupt or insolvent, or if process in any garnishment

proceeding shall be served on the School by reason of the failure of the Field Representative to discharge any judgment entered against him, the School may, at its option, cancel this agreement by mailing notice of such cancellation to the Field Representative's last known address.

(G) In the event the School waives the breach of any term, condition, or covenant on the part of the Field Representative to be performed, said waiver of breach shall not be deemed a continuing waiver of any term, condition, or covenant as contained herein, either prior or subsequent to said breach.

(H) The School may, at its option, terminate this agreement without notice upon the breach of any term, covenant, or condition contained herein to be performed on the part of the Field Representative.

(I) This agreement is personal in character, and any assignment, transfer, or hypotecation [*sic*] thereof on the part of the Field Representative, shall constitute a breach.

Section IV

"Accounting Dates"

(A) On or about the tenth and twenty-fifth days of each month, respectively, a statement of commissions due and payable to the Field Representative from moneys received by the School, from and including the day following the last day of period covered by the previous statement, up to and including the last day of the period covered by the current statement, shall be rendered by the School. All moneys due the Field Representative as indicated in said statement less any sums properly deductible therefrom shall be paid to him concurrently with the rendering of such statement.

Section V
"Bonuses"

(A) A cash bonus of Ten Dollars ($10.00) will be paid to each Field Representative for each enrollment he secures for the School which is accepted by the School; that is, providing the School receives from the student at least 50% of his tuition fee (whether this sum be paid by the student in a week, month, six-months, or a year).

(B) When a student enrolled by the Field Representative pays the entire tuition fee at the time of the enrollment, or within thirty (30) days thereafter, the Field Representative will be paid a bonus of Ten Dollars ($10.00) on all such enrollments. In such an event the Field Representative will not receive the 50% or ten Dollar ($10.00) bonus as described in paragraph "A" under "Bonuses."

Section VI
"Termination of Contract"

(A) Upon the termination of the Field Representative's contract, except as otherwise provided herein, all commissions which the Field Representative has on the books of the School will be paid to him regularly each month thereafter, when, as, and if, they accrue; provided, however, the School retains the right and privilege to withhold payment of his commissions until such time as all supplies, leads, materials, sales manuals and any and all other property furnished him by the School shall have been returned to the School at its executive offices in Los Angeles, California, or as otherwise directed by the School; and provided further, that the School may deduct from said commission owing, the actual expense incurred in creating any leads not returned to the School within

(15) days after the termination of the Contract. The School further reserves the right to charge a Field Representative's commission account for the loss of or damage to any property belonging to the School that the Field Representative fails to return within fifteen (15) days after the termination of this Contract.

Section VIII

"Rates of Commission"

Enrollments are to be divided into two classifications—lead enrollments and personal development enrollments. Lead enrollments are to be considered as those enrollments procured by the Field Representative from leads furnished him by the School. Personal development or P.D. enrollment are those enrollments procured by the Field Representative from any source other than leads furnished him by the School. Basis of commisison on enrollments will be as follows:

(A) Enrollments that are created from leads—$25.00

(B) Enrollments that are created through personal development effort—$25.00, plus a bonus of Fifteen Dollars ($15.00) payable after the full commission of Twenty-five dollars ($25.00) has been paid. In the event a student sends in an acceptable credit questionnaire to the School, the Fifteen Dollars ($15.00) P.D. bonus will be paid immediately and regardless of the amount of tuition paid.

Section IX

"Basis Upon Which Commissions Are Paid"

(A) Commissions will be credited to the Field Representative's account only on enrollments that are accepted by the School.

(B) On all enrollments, the Field Representative is authorized to retain 75% of money collected by him from the student as a down payment or deposit on his application for training, up to the amount of his earned commission; provided further, that the down payment is sufficiently large, so that after the 75% deduction, there remains not less than Two Dollars and Fifty Cents ($2.50) which is the minmum amount of money which must be remitted to the School with the application. The amount designated herein shall be known as "front money."

(C) Out of the monthly installments on tuition accounts received and collected by the School, the Field Representative's account will be credited with fifty percent (50%) of the amount of each payment made by the student within the "commission period" until the Field Representative has received the full amount of his commission to which he is entitled.

(D) "Commission period" is understood to mean the current month during which the student's enrollment is received and accepted at the office of the School in Los Angeles, California, and the eleven calendar months immediately following. For example: The "commission period" on all enrollments received by the School in Los Angeles during the month of September would expire on

August 31st of the following year. It is agreed that the Field Representative will have no participation in payments made by students after the expiration of the "commission period."

Dated this ..... day of ..... A. D. 19.....

.....
Field Representative

.....
Permanent Address

Recommended for appointment subject to acceptance by the School

.....
District Representative

Accepted at Los Angeles, Calif., ..., 19....

by.....
Radio-Television Training School Inc.

Form 1246

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IN THE

Supreme Court of the United States

October Term, 1955.
No. 618

THE CITY OF LOS ANGELES, a municipal corporation, ROGER ARNEBERGH, City Attorney for the City of Los Angeles, WILLIAM H. PARKER, Chief of Police of the City of Los Angeles, WALTER C. PETERSON, City Clerk of the City of Los Angeles,

Petitioners,

vs.

NATIONAL SCHOOLS and RADIO-TELEVISION TRAINING SCHOOL, INC.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the California District Court of Appeal [Ex. A of the Petition] is reported in 135 A. C. A. 393, 287 P. 2d 151. Timely petitions for rehearing and hearing in the Supreme Court of California were both denied without further opinion.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Can the City of Los Angeles under Article I, Section 8, Clause 3 of the United States Constitution impose a

license tax on respondents measured by their gross receipts from correspondence courses conducted by them with students residing outside the State of California.

Statute and Constitutional Provision Invoked.

Article I, Section 8, Clause 3 of the Constitution of the United States and Section 21.149, one of the pertinent sections of the Los Angeles Municipal Code, are set forth in the Petition at page 4.

Section 21.15(h) added to the Los Angeles Municipal Code by Ordinance 104,875, effective February 21, 1955, provides:

> *"Rules and Regulations—Apportionment.* The City Clerk may make such rules and regulations as are not inconsistent with the provisions of this article or Article 1.5 as may be necessary or desirable to aid in the enforcement of this Article and Article 1.5. Where, by reason of the provisions of the Constitution of the United States or the Constitution of California, the tax imposed by this Article cannot be enforced without there being an apportionment according to the amount of business done in the City of Los Angeles, or in the State of California, as the case may be, the City Clerk may make such rules and regulations for the apportionment of the tax as are necessary or desirable to overcome the constitutional objections. Such rules and regulations shall be approved by the City Attorney prior to becoming effective."

Statement.

An adequate statement of the case is set forth in the Petition at pages 5 to 7.

ARGUMENT.

I.

The Decision of the District Court of Appeal Raises No New Question of Law and Will Have No Importance Beyond the Particular Facts and Parties Involved.

A. The District Court of Appeal found that the Los Angeles City License Tax is imposed " 'upon conducting a trade school,' not some minor phase of same supposed to have detached tax relevance such as preparing lessons and grading examination papers or assembling materials for experiments . . ." [Pet. Ex. A, pp. 6-7.] It held in addition that the conduct of a trade school by correspondence with out-of-state students is an inseparable and integral part of interstate commerce. Petitioners contend, on the other hand, that respondents' conduct of correspondence schools is a purely local activity which takes place entirely within the City of Los Angeles.

These cases thus present the narrow question of whether correspondence instruction is as inseparable and integral a part of interstate commerce as radio broadcasting, *Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington,* 297 U. S. 650, loading and unloading ships in interstate commerce, *Joseph v. Carter and Weekes Stevedoring Company,* 330 U. S. 422, and "gathering gas" transmitted interstate, *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U. S. 157, or whether it is a separate and local activity akin to manufacturing, *American Manufacturing Co. v. St. Louis,* 250 U. S. 459, generating electrical power, *Utah Power and Light Co. v. Pfost,* 286 U. S. 165, or selling advertising space, *Western Livestock v. Bureau of Revenue,* 303 U. S. 250. The resolution of

this question can have little significance in an already amply developed field of law.

B. Petitioners assert that the decision of the District Court of Appeal vitally and adversely affects the sources to which a city may resort in raising revenue to support municipal services, and imply that for this reason these cases have a broad significance that requires their review of this Court. (Pet. p. 8.)

The decision of the District Court of Appeal does not invalidate the Los Angeles License Tax Ordinance in any way, but merely requires that the City apportion the tax to the gross receipts of respondents from intrastate tuitions, and finds that these receipts are readily apportionable between intra and inter-state sources. [Pet. Ex. A, pp. 5-7.] The City Clerk of Los Angeles has the specific power to make this allocation under a provision of the Los Angeles Municipal Code enacted since the commencement of these cases. The pertinent provision is set forth above at page 2. The City properly could also measure its license tax by some local aspect of respondents' operations, and is restricted by the decision only to the extent that it cannot require payment of an occupation or business license tax measured by respondents' receipts from out-of-state instruction. Such restriction is hardly a vital thrust at the City's revenue power.

Respondents respectfully submit that the issue raised by the special facts of these cases does not warrant review by this Court on certiorari.

II.

The Decision of the District Court of Appeal Is in Accord With the Applicable Decisions of This Court.

A. A local tax measured by the gross receipts from an activity that is an integral and inseparable part of interstate commerce contravenes the Commerce Clause of the Constitution of the United States. (*Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U. S. 157.) Correspondence instruction is "that intercourse which is commerce" *International Textbook Co. v. Pigg,* 217 U. S. 91, and as conducted by respondents throughout the United States is an inseparable part of interstate commerce similar in practical and legal effect to that of the taxpayers in *Fisher's Blend Station, Inc. v. Tax Commission,* 297 U. S. 650, *Puget Sound Stevedoring Co. v. Tax Commission,* 302 U. S. 90, *Joseph v. Carter and Weekes Stevedoring Co.,* 330 U. S. 422, and *Freeman v. Hewit,* 329 U. S. 249.

Petitioners contend that respondents are engaged in what is in reality a local business whose entire gross receipts are a proper measure of the City's license tax. They seek to place the present cases within the orbit of those cases that have permitted similar taxation of local manufacture, *American Manufacturing Company v. City of St. Louis,* 250 U. S. 459, sale of merchandise, *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, or generation of power, *Utah Power and Light Co. v. Pfost,* 286 U. S. 165. There is, however, a basic and controlling distinction between the activities taxed in those and similar cases and that of respondents. In those cases the local tax was measured by the value or amount of purely local business for the privilege of con-

ducting that business. Respondents' activity, on the other hand, extends far beyond the manufacture or preparation of lesson material. The primary aspect of that activity is the instruction of students. The preparation of lesson material is only a part of a much broader course of conduct incidental to and inseparable from that primary activity. The sales price of the correspondence courses includes much more than the separate value of the lesson material and equipment sent to the student during the course of instruction. It includes the value of the instruction given by respondents in continuous intercourse between the school and students over the period of his course. [Record, pp. 25-29, 80-83.]

B. Petitioners assert that the application of the Los Angeles license tax to all of respondents' gross receipts does not subject them to a cumulative tax burden and that therefore the tax as so applied is constitutional. (Pet., p. 10.)

In answer to this contention respondents submit that a tax that imposes a direct burden on the very processes of interstate commerce is invalid whether or not another state can tax the same gross receipts. (*Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U. S. 157, *Freeman v. Hewit,* 339 U. S. 249. However, tested by the multiple burdens test alone, the Los Angeles license tax as petitioners seek to apply it must fail. Under this test it is the possibility of a multiple tax burden, not its actuality that invalidates the tax. (*Freeman v. Hewit,* 329 U. S. 249, 256.) Each of the states in which respondents' students reside may regulate the instruction which is respondents' business if the public interest of the state were found to require such regulation. (*Travelers Health*

Association v. Virginia, 339 U. S. 643.) This same interest may also bring respondents within the taxing jurisdiction of those states. (*International Shoe Co. v. Washington,* 326 U. S. 310.) The potential taxation of respondents' gross receipts by states other than California is a real possibility that is clearly as imminent as the potential multiple burden presented in *Fisher's Blend Station, Inc. v. Tax Commission,* 297 U. S. 650, *Joseph v. Carter and Weekes Stevedoring Co.,* 330 U. S. 422, and *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U. S. 157.

C. Petitioners assert that this Court has required apportionment of the gross receipts of an interstate business for purposes of local taxation only in cases where the taxpayer has been physically present in states other than the geographical situs of the taxpayer's activities. The law is clear that where a local tax otherwise imposes a direct burden on interstate commerce, it will not be allowed to stand merely because the taxpayer maintains no physical assets in other taxing jurisdictions. (*Fisher's Blend Station, Inc. v. Tax Commission,* 297 U. S. 650, *Freeman v. Hewit,* 329 U. S. 249, *Joseph v. Carter and Weekes Stevedoring Co.,* 330 U. S. 422.) Therefore, respondents' out-of-state receipts cannot properly be used as a measure of the Los Angeles Tax. To the extent that their intra-state receipts are included in the measure of the tax, the City has no cause for complaint. In *Joseph v. Carter and Weekes Stevedoring Co.,* 330 U. S. 422, 424, the court specifically adverted to the fact that no problem of allocation was involved since the City had made no attempt to attribute part of the taxpayers' receipts to local business. It can reasonably be assumed that the court in that case would have permitted the tax

to stand as to such receipts, *Central Greyhound Lines, Inc. v. Mealey,* 334 U. S. 653, as the California District Court of Appeal did in these cases.

Conclusion.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HENRY F. WALKER,
ROBERT S. THOMPSON,
CLIFFORD E. ROYSTON,
CONRAD J. MOSS,
Counsel for Respondents.

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IN THE

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Petitioners,

vs.

NATIONAL SCHOOLS AND RADIO-TELEVISION TRAINING SCHOOL, INC.,

Respondents.

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION.

It is believed that the Brief for Respondents in Opposition calls for a short reply. The following is submitted:

I.

The Brief in Opposition Filed on Behalf of Respondents Fails to Provide Substantiating Authority or Argument on at Least Two Vital Points.

A.

The Los Angeles license tax in this case is imposed upon persons engaged in the *business of conducting a trade school* within the City of Los Angeles. [Secs. 21.10, 21.49 and 21.149, Los Angeles Municipal Code; R. p. 124.]

No authority is cited and no argument is made to support the proposition that, solely through the use of the

United States Mail, the trade school businesses of these respondents, all of whose personnel and physical facilities are within Los Angeles, are somehow transfigured, with the result that petitioners now conduct trade school businesses in every state in which they can obtain a subscriber.

Only if respondents are engaged in business in more than one state do the decisions of this Court require that an apportionment be made. (See authorities cited on p. 11 of Petition.) If these respondents are engaged in the trade school business in each state in which a student resides, it can as well be said that every locally conducted service business, be it the practice of law, the practice of accounting, the operation of a testing laboratory, etc., is carried on in every state where a client resides. No case so holds.

B.

Even if apportionment is proper in this case, the formula adopted by the District Court of Appeal misconstrues the ruling of this Court epitomized in the following quotation: [interstate commerce can be made to] "bear a fair share of the cost of the local government from which it receives benefits."

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 75.

The decision of the District Court of Appeal, through misapplication of the stated rule, has adopted an apportionment formula which excludes *in toto* those receipts which originate outside the State of California. Thus, that part of the commerce carried on by respondents which is interstate is freed, through mistaken reliance

on the scope of the apportionment rule, from all responsibility whatever for the cost of the local government from which it receives benefits.

Compare:

International Harvester Co. v. Evatt, 329 U. S. 416, 421.

II.

Certain Portions of the Brief in Opposition Do Not Correctly State the Law.

A.

No case cited in Part II-B of respondent's brief (pp. 6-7) would support taxation by any state but California of the privilege of conducting a trade school business as carried on by these respondents. The "multiple burdens" test, therefore, does not bar the tax.

While it is conceivable that a state, through its police power, could make correspondence school contracts illegal or unenforceable unless the instructor complied with certain state laws (*cf. Travelers Health Association v. Virginia,* 339 U. S. 643, Resp. Br. p. 6), it is quite another thing to say that a school whose only contact with residents of a state is by mail is engaged in the business of conducting a school in that state and taxable for the privilege of doing so.

Any state, other than California, attempting to tax the privilege of conducting these trade school businesses would be in the same situation as the State of Arkansas in *McLeod v. Dilworth,* 322 U. S. 327, where Arkansas was forbidden to tax sales occurring in Tennessee.

International Shoe Co. v. Washington, 326 U. S. 310, is not different, since the privilege taxed (employing sales-

men) was exercised in Washington. *Travelers Health Association v. Virginia,* 339 U. S. 643, a police power case, if applicable at all, is distinguished on the ground that solicitation of new members was carried on in Virginia by old members of the Association.

B.

Respondents incorrectly assimilate their position to that of the taxpayers in *Fisher's Blend Station, Inc. v. Tax Commission,* 297 U. S. 650, and *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U. S. 422. If the analogy were correct, no local taxation such as here involved would be permitted even for local activities, for their activity would be interstate commerce itself. But since respondents have accepted the District Court of Appeal's decision that *some* local tax is permitted, the trade school business cannot be commerce itself and the analogy fails. The controlling cases are those cited on page 11 of the Petition, and in each of them there is not only a definite separation between the taxable event and the commerce itself (*cf.* 330 U. S., at 433), but an apportionment founded upon and related to the geographical situs of the taxed activity.

Assuming that local taxation is permitted in any degree, if the taxed activity (conducting a trade school) is carried on in more than one state, apportionment is proper in order to allow for potential taxation by the other jurisdiction. But if the taxed activity is conducted solely in one state, no basis exists for exempting any portion. In other words, the tax is self-apportioning.

Conclusion.

It is respectfully submitted that the Respondents Brief in Opposition serves to emphasize, rather than remove, the necessity that the Petition be granted.

ROGER ARNEBERGH,
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BOURKE JONES,
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JAMES A. DOHERTY,
Assistant City Attorney,
Counsel for Petitioners.